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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

**James V. Lacy and United States
Justice Foundation,**

Plaintiffs,

vs.

**United States Department of State;
and
DOES 1 through 10, inclusive,**

Defendants.

Case No.:

8:22-cv-01065-DOC-KES

**Memorandum of Points and
Authorities in Support of Plaintiffs'
Motion for Attorneys' Fees**

Hearing

Date: Aug. 21, 2023

Time: 8:30 a.m.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs succeeded in this FOIA case first by eliciting Defendant's response
3 to their FOIA requests, then by forcing Defendant to conduct broader searches.
4 Those broader searches resulted in Defendant's disclosure of 140 pages of
5 previously withheld records. Plaintiffs' final success came a bit later when
6 Defendant voluntarily released previously redacted material. These successes were
7 substantial despite the Courts' eventual judgment that the remaining redactions
8 were proper.

9 Getting to this point was not easy. As a result of Defendant's conduct during
10 the litigation, Plaintiffs' counsel expended considerably more time than might be
11 necessary in more typical cases. From filing this action to receipt of all documents
12 Defendant disclosed, Plaintiffs' lead counsel expended 61.2 hours, primarily
13 focused on discovery and other activities relating to the reasonableness of
14 Defendant's search. This time included several full days in court trying to resolve
15 these issues, one of which was waiting for Defendant to produce a *Vaughn* Index
16 after it had disregarded several prior orders for it to do so.

17 Once those issues were resolved, Plaintiffs' counsel then expended 72.4
18 hours on the parties' cross-summary judgment motions. That time, however, has
19 been discounted to just 35 hours. In all, Plaintiff claims time totaling 120.7 hours for
20 Chad Morgan and 19.9 hours for Alexander Tomescu. Their fees, along with costs,
21 total \$81,945.00.

22 **STATEMENT OF CASE**

23 Plaintiffs submitted two FOIA requests on February 26, 2020 and a third on
24 February 28, 2022.¹ Defendant's processing of the first request took over two
25 years; its processing of the other two took more than six months.² Defendant's

26 _____
27 ¹ Order Granting in Part Plfs.' Mot. for Summ. J. and Denying Def.'s Mot. for Summ. J.,
28 May 3, 2023 (Dkt. 45) (MSJ Order), 5:17, 8:09, 10:10.

² MSJ Order, 4:01-03; *see also id.*, 5-6, 8-9, 10-12.

1 response to two of the three requests came after the filing of this lawsuit.³ In all
2 three instances, Defendant’s response was the same: “We conducted a search. We
3 located no responsive records.”⁴

4 In this litigation, Plaintiffs challenged Defendant’s determination that it did
5 not have responsive records and sought discovery for that purpose.⁵ In the early
6 stages of this litigation, Defendant conducted “supplemental searches” and
7 “identified, for the first time, potentially responsive documents,” but maintained
8 that no responsive documents had been withheld.⁶ Defendant ultimately disclosed
9 approximately 140 pages of records responsive to the three requests on an
10 intermittent basis from December 2022 to March 2023.⁷ On page 14 of its order
11 granting partial summary judgment to Plaintiffs, the Court summarized these
12 issues:

13 Prior to this lawsuit, the State Department made a determination as to
14 only one request—the Second FOIA Request. After Plaintiffs filed
15 this action, the State Department made determinations on the First
16 FOIA Request and Third FOIA Request. Their response was the same
17 for each request: No responsive records were found. Through this
18 litigation, the Department conducted supplemental searches, located
19 responsive documents, and ultimately produced approximately 140
20 pages to Plaintiffs.

21 The Court ultimately concluded that Plaintiffs were entitled to declaratory
22 relief: “The Department of State violated FOIA by failing to timely respond to
23 Plaintiffs’ three FOIA requests.”⁸ In so ruling, the Court noted that the State

24 ³ MSJ Order, 4:03-04.

25 ⁴ MSJ Order, 4:04-05.

26 ⁵ MSJ Order, 4:07-14.

27 ⁶ MSJ Order, 4:14-16.

28 ⁷ MSJ Order, 4:23-25; *see also id.*, 7, 9, 13-14.

⁸ MSJ Order, 24: 06-08.

1 Department’s position “continued to fluctuate.”⁹ For example, in response to
2 Plaintiffs’ third request, Defendant’s counsel once stated, in writing, that
3 Defendant had identified records responsive to Plaintiffs’ third request and that the
4 documents would be disclosed.¹⁰ Defendant later changed its position: its counsel
5 said, “there has been a change,” those records “now appear[ed] to be non-
6 responsive.”¹¹ Then, on January 13, 2023—days before it was obligated to respond
7 to discovery on the subject—Defendant changed its position again and the
8 disclosed the responsive then non-responsive records.¹²

9 Defendant initially claimed that it changed its position on these records
10 because its October 2022 determination was preliminary and further review
11 showed that the records did not contain calendar entries.¹³ It did not deviate from
12 that position when it eventually disclosed the records. Instead, it argued that it was
13 disclosing the records irrespective of the fact that they were not responsive.¹⁴ But
14 the documents *did contain* calendar entries and were plainly responsive to
15 Plaintiffs’ Third FOIA Request for “written calendar entries ... for Mr. Anthony
16 Blinken ... that reference, and or include ... Hunter Biden.”¹⁵

17 The Court ultimately described Defendant’s delays as “egregious,” and that
18 it not only failed to make determinations within the time frame FOIA requires but
19

20
21 ⁹ MSJ Order, 22:02.

22 ¹⁰ Decl. of Chad Morgan in Support of Plfs.’ Mot. for Summ. J., Mar. 13, 2023 (Dkt. 34-3)
(Morgan MSJ Decl.), ¶ 5; Dkt. 34-5, p. 25 (Plfs.’ Ex. 8).

23 ¹¹ Dkt. 34-5, p. 28 (Plfs.’ Ex. 9) (underline in original).

24 ¹² Morgan MSJ Decl., ¶ 7; Dkt. 34-5, pp. 33 (Plfs.’ Ex. 10), 35 *et seq.* (Plfs.’ Ex. 11)
25 (Defendant’s January 13, 2023 disclosure); *see also* Morgan MSJ Decl., ¶ 8; Dkt. 34-5, p.
83 *et seq.* (Ex. 12: Defendant responded to discovery on January 17, 2023).

26 ¹³ Dkt. 34-5, p. 99 (Plfs.’ Ex. 12, p. 17). 7

27 ¹⁴ *Id.*

28 ¹⁵ MSJ Order, 10:10-18 (the request); *see also* Dkt. 34-5, pp. 49, 63, 66 (Plfs.’ Ex. 11:
responsive calendar entries).

1 also that it did not make determinations “until months into the litigation.”¹⁶
2 Defendant failed to explain these delays and contradicted itself at every stage of
3 this case.¹⁷

4 Looking at the development of this case, the parties’ Joint Scheduling Report
5 was significant turning point. Plaintiffs’ counsel spent a significant amount of time
6 on Plaintiffs’ portion of that report, and the parties debated it vigorously before
7 submitting it. Morgan Decl., ¶ 14. As of that time, Defendant believed it was done:
8 It had completed its search, there were no responsive documents, and Plaintiffs
9 were not entitled to anything.¹⁸ Discovery was the greatest point of contention, and
10 Plaintiffs used that report to make its case that discovery was necessary to evaluate
11 the veracity of Defendant’s contention that it did not possess responsive
12 documents.¹⁹

13 At the scheduling conference, the Court mostly agreed with Plaintiffs. It
14 ordered Defendant to prepare a *Vaughn* Index—which Defendant opposed—and
15 reserved the question of discovery for a future hearing.²⁰ When Defendant failed to
16 produce a *Vaughn* Index,²¹ the Court ordered it to respond to Plaintiffs’
17 interrogatories²². Rather than respond to interrogatories on the subject, Defendant
18 disclosed the records.²³

19
20 ¹⁶ MSJ Order, 22:04-08.

21 ¹⁷ MSJ Order 23:15-17; see also *id.* at 23:20-24:02 (Defendant described a first-in, first-out
22 FOIA policy but could not explain why one of Plaintiffs’ February 26, 2020 FOIA
23 requests was processed more than a year earlier than another request submitted the same
day).

24 ¹⁸ Joint Rule 26(f) Report (Dkt. 17), pp. 2-4.

25 ¹⁹ *Id.* at pp. 6-8.

26 ²⁰ Minute Order, Dec. 5, 2022 (Dkt. 19), p. 3.

27 ²¹ See Def’s Notice of Filing Agency Aff., filed Dec. 20, 2022 (Dkt. 20), p. 2:12

28 ²² Minute Order, filed Dec. 20, 2022 (Dkt. 25); see also Dkt. 21 (Notice of Pls.’ Proposed
Discovery) & 21-1 (Pls.’ First Set of Proposed Interrogatories).

²³ Morgan MSJ Decl. ¶ 7; Dkt. 34-5, pp. 33 (Plfs.’ Ex. 10), 35 et seq. (Plfs.’ Ex. 11.)

1 From December 2022 to March 2023, there was a series of supplemental
2 searches that arose mostly from Defendant's discovery responses and Plaintiffs'
3 contentions at status conferences. For example, in addition to ordering Defendant
4 to respond to Plaintiffs' discovery requests, the Court's December 20, 2022 order
5 also directed Defendant to broaden its search.²⁴ But as of January 13, 2023,
6 Defendant had still failed to provide the *Vaughn* Index the Court had ordered.²⁵
7 When the parties met on January 23, 2023 for a Status Conference, the Court
8 ordered Defendant to produce a *Vaughn* Index that afternoon, which it did.²⁶

9 Prior to the January 23 conference, the Court had ordered the parties to
10 submit a joint status report. Given Defendants' repeated failure to provide a
11 *Vaughn* Index, the parties had substantial debate over the contents of that report.
12 Morgan Decl., ¶ 15. It culminated with separate reports in one document.²⁷
13 Defendant's report was on pages 2-5 and included a proposed timeline for
14 summary judgment briefing.²⁸ In Plaintiffs' portion of the report, pages 5-15, they
15 were not ready to suggest a briefing schedule because, *inter alia*, Defendant
16 maintained its refusal to provide a *Vaughn* Index. When the Court ordered
17 Defendant to produce a *Vaughn* Index that same day, among other orders, it
18 resolved many of Plaintiffs' concerns. Morgan Decl., ¶ 15. As such, that day's
19 order for a briefing schedule moved this case closer to resolution. When the parties
20 came back on February 21, 2023, Defendant had finally complied with all the
21

22
23 ²⁴ Minute Order, filed Dec. 20, 2022 (Dkt. 25).

24 ²⁵ See Dkt. 34-5, pp. 95:04-13, 101:08-20 (Plfs.' Ex. 12, pp. 13, 19);
25 see also Plfs.' Mot. for Summ. J., filed Mar. 13, 2023 (Dkt. 34-1), p. 8.

26 ²⁶ Morgan MSJ Decl. ¶ 9; Preliminary *Vaughn* Index, Dkt. 27-1; Declaration of Susan
26 Weetman, filed Jan. 23, 2023, (Dkt. 27) (Second Weetman Decl.); Minute Order, filed
27 Jan. 23, 2023 (Dkt. 28).

28 ²⁷ Joint Status Report, filed Jan. 19, 2023 (Dkt. 26).

²⁸ See Dkt. 26.

1 Court's orders, and the parties were ready to brief their summary judgment
2 motions.

3 A primary issue in the parties' cross-summary judgment motions was
4 material redacted from Defendant's document production based on FOIA
5 Exemptions 5 and 6. Prior to the hearing, the parties resolved a portion of that
6 dispute. As described in a joint status report following the hearing on those
7 motions, Defendant agreed to disclose some material it had previously withheld
8 based on the deliberative process privilege.²⁹

9
10 **ARGUMENT**

11 "To obtain an award of attorney fees under the FOIA, a plaintiff must
12 demonstrate both eligibility and entitlement to the award." *Oregon Nat. Desert*
13 *Ass'n v. Locke*, 572 F.3d 610, 614 (9th Cir. 2009), citing *Long v. IRS*, 932 F.2d 1309,
1313 (9th Cir. 1991).

14 **I. PLAINTIFFS ARE ELIGIBLE FOR AN AWARD OF ATTORNEYS' FEES.**

15 A FOIA plaintiff who "substantially prevailed" on a claim is eligible for an
16 award of attorneys' fees. *Schoenberg v. Fed. Bureau of Investigation*, 2 F.4th 1270,
17 1275 (9th Cir. 2021); *see also* 5 U.S.C. § 552(a)(4)(E)(i). Under FOIA, a plaintiff
18 who substantially prevailed is a plaintiff who obtains relief through either (1) a
19 judicial order or enforceable agreement, or (2) "a voluntary or unilateral change in
20 position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C.
21 § 552(a)(4)(E)(ii); *see also Schoenberg* at 1275.

22 Courts previously considered two threshold considerations to answer this
23 question: (1) was the FOIA action necessary to obtain the information, and (2)
24 whether the action "had a 'substantial causative effect' on the ultimate receipt of
25 that information." *See O'Neill, Lysaght & Sun v. Drug Enf't Admin.*, 951 F. Supp.
26 1413, 1418 (C.D. Cal. 1996) (*O'Neill*), citing *Long*, 932 F.2d at 1313. But 2007
27

28 ²⁹ Joint Status Report Following Hearing on Summ. J. Motions, Apr. 4, 2023 (Dkt. 42).

1 amendments to FOIA abrogated those tests. *Poulsen v. Dep't of Def.*, 994 F.3d 1046,
2 1050 (9th Cir. 2021). Under today's law, "a complainant need not show a causal
3 connection between the FOIA lawsuit and the government's change in position to
4 establish that he has 'substantially prevailed.'" *Id.*

5 On one hand, Defendant voluntarily changed its position in several ways.
6 First, with respect to Plaintiffs' first and third requests, it took this lawsuit to
7 compel Defendant's voluntary search for records. Second, after disclaiming
8 possession of records responsive to all three of Plaintiffs' requests, Defendant
9 voluntarily disclosed records in response to each. This disclosure included the
10 documents Defendant identified as responsive before it later withheld them as
11 nonresponsive. Third, after full briefing of the summary judgment motions,
12 Defendant voluntarily disclosed material that it previously redacted.³⁰ None of this
13 would have been possible without filing this lawsuit, pursuing discovery, and
14 briefing Plaintiffs' summary judgment motion seeking disclosure of the redacted
15 material.

16 On the other hand, this Court also entered judgment in Plaintiffs' favor. In
17 doing so, the Court explicitly noted Defendant's inexplicable delays and fluctuating
18 position. Additionally, prior to entry of judgment, the Court ordered Defendant to
19 conduct various supplemental searches. Those searches helped establish the
20 reasons why Plaintiffs ultimately accepted the adequacy of Defendant's search,
21 which was among the reasons why the Court granted summary judgment in
22 Defendant's favor on that issue. Without those interim orders, which changed the
23 relationship between the parties,³¹ the summary judgment motion might have been
24 decided differently. The fact of this judgment and prior orders is an alternative
25 basis for a conclusion that Plaintiffs are eligible for an award of attorneys' fees.

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27 ³⁰ See Joint Status Report Following Hearing on Summ. J. Motions, Apr. 4, 2023 (Dkt.
42).

28 ³¹ See *Poulsen*, 994 F.3d .at 1053.

1 **II. PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES.**

2 District courts have discretion to determine whether a plaintiff is entitled to
3 fees. *Schoenberg*, 2 F.4th at 1275. To answer this question, they consider and
4 balance four factors to determine whether a successful FOIA plaintiff is entitled to
5 attorneys' fees: "(1) the public benefit from disclosure, (2) any commercial benefit
6 to the plaintiff resulting from disclosure, (3) the nature of the plaintiff's interest in
7 the disclosed records, and (4) whether the government's withholding of the
8 records had a reasonable basis in law." *Id.* at 1275-76.

9 **A. Plaintiffs litigated this FOIA request for the public benefit.**

10 "Under the first criterion a court would ordinarily award fees ... where ... a
11 publication or a public interest group was seeking information to further a project
12 benefiting the general public, but it would not award fees if a business was using the
13 FOIA to obtain data relating to a competitor or as a substitute for discovery in
14 private litigation with the government." *Los Angeles Gay & Lesbian Cmty. Servs.*
15 *Ctr. v. IRS*, 559 F. Supp. 2d 1055, 1058 (C.D. Cal. 2008) (*L.A. Gay & Lesbian Cmty.*
16 *Servs. Ctr.*).

17 Plaintiff USJF is "a nonprofit public interest, legal action organization."³²
18 USJF and James V. Lacy, acting on its behalf, requested records and litigated this
19 FOIA case to evaluate issues relating to Hunter Biden, his father, President Joe
20 Biden, their ties to foreign interests, and other matters of public concern. On this
21 topic, USJF previously published a 72-page open source "Biden-Ukraine
22 Corruption Inquiry Report."³³ Related to this case, there had been media reports
23 that a someone found Hunter Biden's laptop and discovered emails on it, which
24 had been released into the public domain. Morgan Decl., ¶ 50. The source of that
25 information had been questioned and claims made that the emails purportedly
26 found on Hunter Biden's laptop had been faked. *Id.* But emails disclosed in this

27 ³² Lacy MSJ Decl., ¶ 7 (Dkt. 34-4, p. 3).

28 ³³ Lacy MSJ Decl., ¶ 11 (Dkt. 34-4, pp. 3-4).

1 case were identical to emails reportedly found on Hunter Biden’s laptop. *Id.* This
2 tends to support a conclusion that the Hunter Biden laptop emails are genuine.
3 Those emails and related subjects have been the subject of Congressional inquiries
4 and other public debate such that there is an unquestionable public benefit. Morgan
5 Decl., ¶ 52.

6 **B. Plaintiffs did not receive a public benefit from this action.**

7 “Under the second criterion a court would usually allow recovery of fees
8 where the complainant was indigent or a nonprofit public interest group but would
9 not if it was a large corporate interest (or a representative of such an interest).”
10 *L.A. Gay & Lesbian Cmty. Servs. Ctr.*, 559 F. Supp. 2d at 1060. USJF is a nonprofit
11 public interest group—not a corporate interest—so this factor weighs in favor of a
12 fee award.

13 In a prior filing, Defendant seemed to criticize Plaintiffs’ use of this case in
14 support of fundraising appeals necessary to support their operations on behalf of
15 the public, both related to public interest litigation as well as other research
16 activities. This is not the type of commercial benefit that would weigh against a fee
17 award to Plaintiffs. *See, e.g., Elec. Priv. Info. Ctr. v. Nat’l Sec. Agency*, 87 F. Supp. 3d
18 223, 234 (D.D.C. 2015). To the contrary, numerous courts have recognized that
19 nonprofit public interest organizations do not receive commercial benefits from
20 their work.³⁴ Plaintiffs have not found one case where a nonprofit organization was
21 deemed to have a commercial interest in the result of a FOIA request.

24 ³⁴ *See Urb. Air Initiative, Inc. v. Env’t Prot. Agency*, 442 F. Supp. 3d 301, 315–16 (D.D.C.
25 2020); *Elec. Priv. Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 811 F. Supp. 2d 216, 235
26 (D.D.C. 2011); *Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 820 F.
27 Supp. 2d 39, 45 (D.D.C. 2011); *Elec. Priv. Info. Ctr. v. Fed. Bureau of Investigation*, 72 F.
28 Supp. 3d 338, 347 (D.D.C. 2014); *Campaign for Responsible Transplantation v. U.S. Food &
Drug Admin.*, 593 F. Supp. 2d 236, 242 (D.D.C. 2009); *Elec. Priv. Info. Ctr. v. United
States Dep’t of Homeland Sec.*, 218 F. Supp. 3d 27, 45 (D.D.C. 2016).

1 **C. Plaintiffs’ interest in the records does not weigh against a fee award.**

2 This is often considered with the second factor. *L.A. Gay & Lesbian Cmty.*
3 *Servs. Ctr.*, 559 F. Supp. 2d at 1060. “Under the third criterion a court would
4 generally award fees if the complainant’s interest in the information sought was
5 scholarly or journalistic or public-interest oriented, but would not do so if his
6 interest was of a frivolous or purely commercial nature.” *Id.* As discussed above,
7 Plaintiffs’ interest in this case and the underlying government records is purely in
8 the public interest and was not frivolous.

9 **D. There was no reasonable basis in law for the government’s conduct, which**
10 **gives rise to attorneys’ fees.**

11 This factor can weigh in the government’s favor only if the government
12 “had a colorable basis in law” to withhold the documents. *Schoenberg*, 2 F.4th at
13 1276. Any other reason, including the avoidance of embarrassment weighs against
14 the government in this analysis. *Id.*

15 There are several bases for fees in this case, and this factor does not weigh in
16 Defendant’s favor on any of them. Defendant’s delay in responding to Plaintiffs’
17 request was not supported by “a colorable basis in law.” To the contrary, on this
18 issue, the Court entered judgment that Defendant violated FOIA. The same is
19 generally true as to the scope of the search, which Plaintiffs conceded as sufficient
20 only *after* several orders from the Court directing a broader search. The fact of
21 those orders shows that there was no colorable basis of law for Defendant’s narrow
22 search.

23 This leaves the redacted documents Defendant disclosed after the parties
24 completed their summary judgment briefing. Each document Defendant disclosed
25 had been redacted based on the deliberative process exemption. *See* Plfs.’ Opp. to
26 Def.s’ Mot. for Summ. J., filed Mar. 20, 2023 (Dkt. 37), pp. 8-12. The deliberative
27 process privilege protects “documents reflecting advisory opinions,
28 recommendations and deliberations comprising part of a process by which

1 governmental decisions and policies are formulated.” *Dep’t of Interior v. Klamath*
2 *Water Users Protective Ass’n*, 542 U.S. 1, 8 (2001) (*Klamath Water Users*). Plaintiff
3 argued that the privilege did not apply to several documents which had been
4 disclosed to government outsiders, a problem of “selective disclosure [that] is
5 offensive to the purposes underlying the FOIA and intolerable as a matter of
6 policy.” *State of N. D. ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978).

7 After full briefing on the subject,³⁵ Defendant agreed to disclose the records.
8 By that point, it should be presumed that briefing convinced Defendant of its error
9 and that it agreed to disclose the documents on that basis. If Defendant genuinely
10 believed otherwise or had a colorable basis to defend the redactions, why not let the
11 Court decide the issue—Defendant had already done all the work necessary to
12 present the issue.

13 **III. THE COURT SHOULD AWARD ATTORNEYS’ FEES AND COSTS IN**
14 **THE AMOUNT OF \$81,945.00.**

15 As discussed above, Plaintiffs are both eligible for and entitled to recover
16 fees. As such, a fee award is mandatory. *Long v. IRS*, 932 F.2d at 1314. The
17 customary method for awarding fees is the lodestar method, which is performed by
18 multiplying the number of hours reasonably expended by the prevailing party in the
19 litigation by a reasonable hourly rate. *Hiken v. Dep’t of Def.*, 836 F.3d 1037, 1044
20 (9th Cir. 2016). There is a strong presumption that the lodestar figure represents a
21 reasonable award, and the figure should only be departed from if certain factors
22 relating to the nature and difficulty of the case overcome this strong presumption
23 and indicate that such an adjustment is necessary. *Id.*

27 ³⁵ That briefing included evidence and argument that the deliberative process emails in
28 question had in fact been communicated to government outsiders. Plfs.’ Opp. to Def.’s
Mot. for Summ. J. (Dkt. 37), pp. 8-11.

As discussed below, Plaintiffs request fees as follows:

Attorney	Hours	Rate	Total
Chad Morgan	120.7	\$595	\$71,816.50
Alexander Tomescu	19.9	\$485	\$9,651.50
Costs			\$477.00
Total			\$81,945.00

The costs identified above include the \$402 filing fee and \$75 for service of process. Morgan Decl., ¶ 29.

A. The reasonable hourly rate for Plaintiffs’ counsel is \$595 for Chad Morgan and \$485 for Alexander Tomescu.

The reasonable rate should generally be guided by “the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.” *Hiken*, 836 F.3d at 1044. In general, “[a]ffidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *Id.*

The market rate for lead counsel in comparable cases starts at \$650 per hour. Morgan Decl. ¶ 40. Morgan’s rate is and has been considerably less than that. From 2017 to 2020, it was generally fixed at \$425 per hour. *Id.* at ¶ 41. An adjustment for cost-of-living increases from 2017 to today should put Morgan’s hourly rate at \$516. *Id.* at ¶ 44. The additional increase to \$595 per hour is an experiential increase of just three percent per year. *Id.* A recent award at \$500 per hour—or \$575 per hour with the 1.15 multiplier—is still less than the reasonable market value of Morgan’s services. *Id.* at ¶¶ 46-47. The increase to \$595 is necessary to ensure that plaintiffs pursuing public interest litigation have access to representation, *id.* at ¶¶ 48-49, and gives full effect to Morgan’s substantial legal and non-legal experience in this practice area, *id.* at ¶¶ 30-39.

1 While Morgan seeks fees at close to his market rate, Tomescu seeks fees that
2 are much less. His \$485 hourly rate is far below market value for comparable
3 services. Tomescu Decl., ¶ 5; Morgan Decl., ¶ 40.

4 **B. Morgan and Tomescu reasonably expended 120.7 and 19.9 hours,**
5 **respectively, representing Plaintiffs' interests in this case.**

6 In paragraphs 7 through 25 of his declaration, Morgan describes the
7 reasonableness of the time he expended in considerable detail. The 61.2 hours
8 expended prior to February 14, 2023 was necessary to obtain the documents
9 Plaintiffs received. While this was a lot of time, it was time reasonably expended as
10 a direct result of Defendant's conduct. See Morgan Decl., ¶¶ 11-15. Courts in
11 similar situations have awarded fees for more time that might be reasonable in
12 different circumstances when the increase is a result of the defendant's conduct.
13 *O'Neill*, 951 F. Supp. at 1426.

14 Morgan's billing for time expended after February 14, 2023 is more modest.
15 While he expended 72.4 hours litigating the parties' cross-summary judgment
16 motions, he has discounted that time substantially, billing for only 35 of those
17 hours. Morgan Decl., ¶¶ 16-24. His discounts seek to apportion time between
18 Plaintiffs' successful and unsuccessful claims, *id.* at ¶¶ 21-22, and write-off time
19 that should not be billed at all, *id.* at ¶ 20.

20 In addition to time expended litigating the merits, Morgan is entitled to
21 recover the 24.5 hours he reasonably expended (and will expend) litigating fees.
22 (Morgan Decl., ¶ 25; see also *Rosenfeld v. U.S. Dep't of Just.*, 903 F. Supp. 2d 859,
23 878 (N.D. Cal. 2012), citing *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir.1990)
24 ("The district court may award attorney fees at market rates for the entire course
25 of litigation, including time spent preparing, defending, and appealing the two
26 awards of attorney fees.") Morgan's time on fees includes both the time expended
27 to file this motion as well as the time he anticipates to file a reply and appear at the
28 hearing on the motion. Morgan Decl., ¶ 25.

1 In addition to Morgan's time, Tomescu's 19.9 hours were reasonably
2 expended. His entries were carefully scrutinized to remove duplicative billing and
3 retained only those where he added value to the litigation. Tomescu Decl., ¶ 3;
4 Morgan Decl., ¶ 26. Tomescu's involvement in and familiarity with the underlying
5 factual issues ultimately reduced the amount of time Morgan would have expended
6 on this case. Morgan Decl., ¶¶ 27-28.

7 **CONCLUSION**

8 As discussed above, Plaintiffs were successful in this action to enforce their
9 rights under FOIA. The work Plaintiffs' attorneys performed in this case was
10 necessitated by Defendant's conduct during the litigation, including its
11 inconsistent positions and its refusal to comply with Court orders. Plaintiffs have
12 reasonably reduced the hours billed to account for unsuccessful claims, and should
13 be awarded attorneys' fees and costs in the amount of \$81,945.00, as requested.

14
15 DATE: July 21, 2023

16 Respectfully Submitted,
17 LAW OFFICE OF CHAD D. MORGAN
18 By: /s/ Chad D. Morgan
19 Chad D. Morgan Esq.,
20 Attorney for Plaintiffs
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs James V. Lacy and United States Justice Foundation, certifies that the memorandum of points and authorities contains 5,194 words, which complies with the word limit of L.R. 11-6.1.

DATE: July 21, 2023

Respectfully Submitted,
LAW OFFICE OF CHAD D. MORGAN
By: /s/ Chad D. Morgan
Chad D. Morgan Esq.,
Attorney for Plaintiffs